80-1276

Office-Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1980

In the Matter of

Sealed Affidavits To Search And Seizure Warrants Issued And Executed On July 11, 1980

Leonard Patricelli,

Petitioner,

vs.

United States Of America

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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Question Presented for Review

When there is no criminal prosecution *in esse,* is a district court's denial of a motion for unsealing of affidavits upon which search warrants issued or, in the alternative, for the suppression or return of seized property a final decision within the meaning of 28 U.S.C. §1291 so as to be appealable to the Court of Appeals?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Leonard Patricelli prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 25, 1980.

Opinions Below

The United States Court of Appeals for the Second Circuit rendered its decision on November 25, 1980. The ruling of the District of Connecticut was rendered on August 1, 1980. Neither opinion was reported. They are reproduced in the appendix of this petition (A. 16-18).

Jurisdiction

The decision of the Court of Appeals is dated November 25, 1980. Jurisdiction to review the judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

Statute and Rule Involved

28 U.S.C. §1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41(e) F.R.Cr.P.:

> MOTIONS FOR RETURN OF PROPERTY. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it

shall be treated also as a motion to suppress under Rule 12.

Statement of the Case

Since July 11, 1980, petitioner Leonard Patricelli has been deprived of his automobile, cash and other property by the Government on the basis of search and seizure warrants issued upon affidavits sealed from his view since that time. The Government has not obtained a criminal complaint against, an information against, an indictment of or the arrest of petitioner; nor has it suggested when, if ever, it will permit the affidavits upon which the warrants issued to be unsealed. The sealing of the affidavits and the seizure were independent of any criminal proceeding *in esse.* Other than to indicate that the property seized may be presented to a grand jury, the Government has made no representation as to whether it will charge petitioner with an offense in the future.

This petition brings to this Court for review the decision of the United States Court of Appeals for the Second Circuit dismissing petitioner's appeal from a ruling by the United States District Court for the District of Connecticut (A. 17). The district court had upheld a ruling by a United States Magistrate denying petitioner's motion for unsealing of the search warrant affidavits or, in the alternative, return and suppression of the seized property (A. 16). The affidavits were sealed in the first instance by order of the magistrate (A. 12) on July 11, 1980, the day he issued search and seizure warrants for (1) petitioner's person; (2) his home; and (3) his automobile.

Agents of the Federal Bureau of Investigation and the Drug Enforcement Administration executed the warrants on the day they were issued and seized over $3,000 in currency, keys, petitioner's driver's license and other items from his person (A. 1-2). At approximately the same time as the search of petitioner's person, at least nine federal agents conducted a thorough search of his home (A. 8).

Reasons for Granting the Writ

This petition presents a single issue important to the administration of justice: the appealability of a district court order, keeping sealed indefinitely documents which furnished the basis for the seizure of petitioner's property when there is no criminal prosecution *in esse*. Review of the decision of the court below by this Court is called for (1) because the decision is in conflict with the decisions of other federal courts of appeals on the same matter and (2) because the decision is in conflict with an applicable decision of this Court.

I. In its brief opinion, the Court of Appeals dismissed petitioner's appeal because, in its view, "the essential character" of appellant's motions was suppression of the seized items." (A. 17). It made reference to this Court's decision in *DiBella* v. *United States,* 369 U.S. 121 (1962), where the Court held:

> "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. *Ibid.;* see *Carroll* v. *United States,* 354, U.S. 394, 404 n. 17; *In Re Brenner,* 6 F.2d 425 (C.A. 2d Cir. 1926." 369 U.S. at 132.

What the Court of Appeals held, then, is that even if there is no criminal prosecution *in esse* a decision on a motion is not appealable under *DiBella* unless it is *solely for the return of property.* Assuming the characterization of petitioner's motion were correct,[1] the decision of the Second Circuit is in conflict with decisions of the Eighth, Fifth and Tenth Circuits. These circuits have all rejected the literal reading of *DiBella* and have held that a district court decision denying relief is appealable if it is no way tied to a criminal prosecution *in esse.*

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[1]The Court of Appeals' view of petitioner's motion ignores that the motion first seeks the unsealing of the affidavits and then in the alternative the suppression and return of the material seized.

In *United States* v. *Alexander,* 428 F.2d 1169 (8 Cir. 1970), the Eighth Circuit heard an appeal of a suppression motion which had been filed prior to indictment. The court stated:

> "The crucial consideration in deciding whether an order denying or granting a motion for suppression or return of illegally seized evidence is appealable is whether the motion and order were independent of any criminal proceedings *in esse. DiBella* v. *United States,* 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962); *Carroll* v. *United States,* 354 U.S. 121, 82 S.Ct. 1332, 1 L.Ed.2d 1442 (1957).... When the order rendered on the motion *is* independent of any criminal prosecution against the movant it is considered 'final' within the meaning of §1291." 428 F.2d 1171. (Emphasis in original, citations omitted).

The court in *Alexander* held that it had jurisdiction to hear the appeal because the appellants had not been arrested or arraigned and were not under indictment or information. Thus the order denying suppression was "independent of a criminal prosecution *in esse" Id.* See also *Shea* v. *Gabriel,* 520 F.2d 879, 881-882 (1 Cir. 1975). Significantly, the Eighth Circuit in *Alexander* pointed out:

> "A literal reading of the *DiBella* decision indicates that the proceeding [must] be solely for the return of the property, as well as being independent of a criminal prosecution. However, such a reading of *DiBella* seems inconsistent with footnote 17 of the *Carroll* opinion, 354 U.S. at 404, 77 S.Ct. 1332, which is cited with approval by *DiBella.* We adhere to the principles enunciated in that note in interpreting the *DiBella* decision." 428 F.2d at 1171, n. 3.

The note referred to by the Eighth Circuit comes from *Carroll* v. *United States,* 354 U.S. 394 (1957). There it was stated by this Court:

> "We do not suggest that a motion made under Rule 41(e) gains or loses appealability simply upon whether it asks return or suppression or both.... The 'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in a criminal case." *Id.* at 404, n. 17.

In *Richey* v. *Smith,* 515 F.2d 1239 (5 Cir. 1975), the appellants had made a pre-indictment motion for suppression and return. The district court ruled that it was without jurisdiction to hear the motion. On appeal the Fifth Circuit rejected the respondent's contention that the district court's order was not a final judgment subject to appellate review under 28 U.S.C. §1291. The court held that the mere fact that the motion had sought suppression as relief did not prevent it from being appealable. The court stated:

> "In these circumstances, we determine that the district court order was final and is properly before us for appellate review." 515 F.2d at 1293.

> "In *United States* v. *McWirter,* 5 Cir. 1967, 376 F.2d 102, we stated that 'the definition of a final judgment is a pragmatic one.' *Id.* at 105. We indicated that appellate review must be appropriate where to deny the right to appeal at a specific time would in effect deny the right to appeal at all on the specific issue. Here, failure to review the district court ruling on the jurisdictional issue at this juncture would foreclose the possibility of review altogether. In addition, because the motion for return is a discrete action, not tied to any other civil or criminal proceedings, to grant review would not frustrate the policy against piecemeal review in federal cases." *Id.* note 6.

In *Gottone* v. *United States,* 345 F.2d 165 (10 Cir. 1965), the appellant had moved pursuant to Rule 41(e) for return and suppression of certain papers and materials taken by Internal Reve-

nue Service Agents from his person, automobile and home. In discussing the issue of the appealability of the district court order, the court of appeals stated:

> "Appellant is not under arrest nor is an information or indictment outstanding against him. Since the motion is not made in nor dependent upon a case *in esse,* the District Court's denial of such a motion is an appealable order...and within the exception set forth in *DiBella* v. *United States,* 369 U.S. 121, 131-132, 82 S.Ct. 654, 7 L.Ed.2d 614." 345 F.2d at 165 (Citations omitted).

Thus, the Tenth Circuit follows the approach of the Fifth and Eighth Circuits in their refusal to require that a motion be solely for return in order to be appealable.

The holding of the court below that an order denying a motion must be solely for return of — as opposed to suppression of — property, as well as independent of a criminal proceeding *in esse,* before it is appealable does not withstand analysis. A paradox arises from the fact that Rule 41(e) states explicitly that if the motion for return of property is granted, "the property shall be restored and it shall not be admissible in evidence at hearing or trial" (emphasis added). Thus a Rule 41(e) motion for return by definition seeks suppression because that relief is built into the rule. Since suppression results automatically from an order of return, there is for all practical purposes, no such thing as a Rule 41(e) motion which is "solely for return."

When the court below comes to the conclusion — buttressed by the Ninth, First and Sixth Circuits in *Church of Scientology of California* v. *United States,* 591 F.2d 533 (9 Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980); *Imperial Distributors, Inc.* v. *United States,* 617 F.2d 892 (1 Cir. 1980); and *Consumer Credit Insurance Agency, Inc.* v. *United States,* 599 F.2d 770 (6 Cir. 1979), that the literal language of *DiBella* controls — it conflicts with the Eighth, Fifth and Tenth Circuits and thus the conflict

between the courts of appeals is clear. In situations where there was no criminal prosecution *in esse,* the Fifth, Eighth and Tenth Circuits have all heard appeals of decisions on motions which sought suppression in addition to other relief. By its decision here, the Second Circuit will not. The conflict, then, between the decisions of the courts of appeals is clear.

II. Once it is recognized that petitioner's motion was essentially a motion to inspect the sealed affidavits or in the alternative to suppress and return the property seized (A. 10, A. 14), it is apparent that the Court below decided a federal question in a way to conflict with an applicable decision of this Court.

The underlying issue to be raised in the court of appeals was whether the magistrate had power to seal the affidavits. Absent appealability, that issue cannot be raised be petitioner. If petitioner is never charged with a crime, the issue of the sealability of the affidavits cannot be raised, the court of appeals has now ruled. If petitioner is charged and the affidavits are unsealed, the issue of the original sealability may be moot. This means then that petitioner may never obtain review on the issue of the power of the magistrate to seal the affidavits at the outset. To hold as it did, the court below was in conflict with this Court's ruling in *United States* v. *Ryan,* 420 U.S. 530 (1971). *Ryan* involved the appealability of an order denying a motion to quash a subpoena issued prior to the institution of criminal proceedings. This Court stated in *Ryan* that an appeal from a pre-indictment motion would be heard where "denial of immediate review would render impossible any review whatsoever of an individuals claims...." 402 U.S. at 533. This Court went on to state:

> "We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant. See *DiBella* v. *United States, supra,* at 131-132, 7 L.Ed.2d at 621, 622. Denial of review in such circumstances would mean that the Government might indefinitely retain the property

without any opportunity for the movant to assert on appeal his right to possession." *Id.*

What this Court said in *Ryan* about a motion to quash a subpoena is equally applicable to those portions of petitioner's motion by which he seeks unsealing of the affidavits. To the extent that petitioner requests unsealing of the affidavits and return of his property, there is no reason to preclude review merely on the basis that the original petition sought suppression of the seized property as an alternative relief.

CONCLUSION

Petitioner's plight is not an isolated one. In the small district of Connecticut only, the Government has obtained the sealing of search warrant affidavits in at least two other matters now pending. In the orderly administration of justice, review by this Court is in order to resolve the conflict in the circuits and to assure that the issue concerning the power of a magistrate to initially seal search warrant affidavits can be resolved.

For these reasons, then, this Court should — and petitioner requests that it does — issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

Jacob D. Zeldes
Joseph C. Gasparrini
Zeldes, Needle & Cooper
A Professional Corporation
Post Office Box 1740
Bridgeport, Connecticut 06601
Counsel for Petitioner

January 23, 1981

No.

In The

Supreme Court of the United States

October Term, 1980

In the Matter of

Sealed Affidavits To Search And Seizure
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APPENDIX

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RETURN

I received the attached search warrant July 11, 1980, and have executed it as follows:

On July 11, 1980 at 3:29 p.m. o'clock, I searched the person or premises described in the warrant and

I left a copy of the warrant with Leonard Patricelli together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

see attached inventory list

This inventory was made in the presence of SA Edward Adams and SA Donald G. Brutnell.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

John H. Schiman /s/

Subscribed and sworn to me and returned before me this 16th day of July, 1980.

Thomas P. Smith /s/

Federal Magistrate

A receipt for the following items were seized by Special Agents Donald G. Brutnell and Edward Adams of the Federal Bureau of Investigation on July 11, 1980 at Marriott Inn, Stamford, Conn.:

U.S. Currency:

One (1) dollar bills — six (6)	6.00
five (5) dollar bills — twenty three (23)	115.00
ten (10) dollar bills — two (2)	20.00
twenty (20) dollar bills — five (5)	100.00
fifty (50) dollar bills — one (1)	50.00
one hundred (100) dollar bills — thirty (30)	$3,000.00
ten cents (10) — 8	.80
	$3,291.80

One piece paper (white, torn) phone number 322-7328 — Toy

One (1) gold money clip — twenty dollar gold piece — date 1928

One (1) drivers license, State of Conn. expiration date 8/17/81. Name of Patricelli, Leonard, Jr., 27 Mariners La., Stamford, Ct.

Key ring (silver in color) holding five (5) keys.

Donald G. Brutnell, SA, FBI, New Haven 7/11/80
Edward M. Adams, Jr., SA, FBI, New Haven, 7/11/80

(signed) Leonard Patricelli

RETURN

I received the attached search warrant July 11, 1980, and have executed it as follows:

On July 11, 1980 at 2:18 o'clock P.M., I searched the person or premises described in the warrant and

I left a copy of the warrant with Carol Zelinsky Patricelli together with receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

See attached inventory list.

This inventory was made in the presence of John H. Schiman, Terrence Sprankle, William Allen and Donald S. Batt.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

John H. Schiman /s/

Subscribed and sworn to me and returned before me this 16th day of July, 1980.

Thomas P. Smith /s/
Federal Magistrate

RECEIPT

On 7-11-80, the following items were removed from the residence at 115 Hamilton Ave., Stamford, Connecticut, are being retained by the Federal Bureau of Investigation and/or Drug Enforcement Administration as evidence.

Upstairs office, southeast corner of residence, desk drawer as follows:

1. $40,000 90 day note in name Joseph Merkin at Union Trust Company.
2. Notices for payments to Sahara Hotel, Las Vegas, Nevada.
3. Agreement for $25,000 to Lennie Patricelli from David Sigler.
4. 3 slips of paper containing various numbers.
5. Two keys.
6. One box dice.

Upstairs office, closet along Northwest wall:

1. APF Mark III calculator.
2. Check #3130, for $5,000, drawn on account of Vendola Construction Co., Stamford, Conn., signed by David Vendola.
3. Check, not numbered, pay to Leonard Patricelli, dated March 2, 1976, in the amount of $9,000.
4. Miscellaneous keys. Not connected.
5. Six keys on key chain.
6. Racing slips for Belmont Raceway including betting stub, handicap selections, and program.
7. Deposit slip to Carol Zelinski's checking account $13,703.58.
8. Three slips of paper, tel #'s.

The following items were removed from the master bedroom, upstairs:

1. Box marked custom automotive industries containing scale, cellophane packets, notes re quantities and testing equipment, left bedroom closet.
2. Alladin vacuum bottle containing three packages of white powder packed in rice.
3. Black zippered plaid suitcase.
4. Address book located in closet.
5. $2,000 U.S. currency found in 2nd drawer from bottom of man's dresser, master bedroom.
6. Piece of paper found in closet.
7. Miscellaneous papers from upper left compartment of man's dresser.
8. Miscellaneous papers from upper right compartment of man's dresser, master bedroom.
9. Photograph from Beachcomber, Las Vegas, located attic crawl space.
10. One box .39 cal. ammo — and misc. shells.
11. Box .32 cal. handgun ammunition.
12. One .32 cal. Colt automatic. Ser. #92193, with loaded clip.
13. One handgun carrying case.
14. One Mossburg 12 ga. pump shotgun, Ser. #B 57904 & 2 shells.

Inside lower desk drawers:

1. One passbook in the name of Leonard Patricelli, Account #95 0013803 Connecticut Bank and Trust.
2. Connecticut Bank and Trust Company Combined Statement in the name of Leonard Patricelli, acct #7589816 and 950013803. 0/0/0 - 4/18/79.
3. CBT Combined Statement in the name of Leonard Patricelli Acct #7589816 and 950013803, 4/18/80 - 5/19/80.
4. Union Trust Bank statement in the name of Carol Zelinsky. Statement date 10/18/79. Account #9-359-438.

5. Five rubber band wound packs of bank records.
6. One blue box containing two (2) pair of dice.

From small trash can in TV Rm at left of stairs.

1. One (1) small plastic bag with white residue inside.
2. Four (4) pages from "wire-in-dex" tablet containing numbers.
3. Two (2) pages from "Smart Shopper Memo Pad" with writing on them.
4. Two (2) miscellaneous papers with teams and points on them.
5. Four (4) miscellaneous papers with names and numbers.

Small roll top desk, left TV Room Top of stairs (white telephone, #327-6924):

Top Shelf
Left Compartment

2 decks "Delta Air Lines" playing cards.

Cancelled checks from account #120909-4, n/o Leonard Patricelli at Liberty National Bank to Pamela Bonvenute, & check register.

Blank checks & check register, acct #758-981-6, n/o Leonard Patricelli, at CBT Stamford.

Center Section: 2 small slips of white paper

1. 357-0118 — Billy
2. 327-1307
   327-3813 & several keys

R. Section

2 partial rolls of adding machine tape

1 pack of misc. business cards.

Top of Desk

"Mini file" of names & phone numbers in plastic holder

1 small slip of white paper w/names & "points"

1 green 6 x 4 wire-in-dex tablet (pages blank)

Envelope w/unexecuted "Release of Lien" (return add of Fraser, Bello & Lapine).

Envelope for "Collector of Taxes" w/phone #327-8770.

Cancelled checks & Statement for May, 1980, June, 1980 Acct #7589816, n/o Leonard Patricelli

1 "Smart Shopper" Memo Pad, 3" x 9", w/names & addresses

On floor next to leather chair in left TV rm upstairs:

1 - EC - 3001 Rechargeable Printing Calculator from Radio Shack (plugged into wall)

1 - white 6 x 4 card with blue & red writing

1 - red 6 x 4 wire-in-dex tablet

1 - blue 8 x 5 wire-in-dex tablet

2 Major League Baseball News & Schedules, both "Number 6" for games ending July 20, 1980.

1 Red "Flair" pen.

1 clipboard.

From Kitchen:

An address book containing telephone numbers.

WITNESSES:

Terrence Sprankle, DEA

Arthur Rose, DEA

Barry Abbott, DEA

Gary Sloboda, DEA

John H. Schiman, FBI

William A. Allen, FBI

Edwin W. Buffum, FBI

Andrew Aquilini, FBI

Donald S. Batt, FBI

Date July 17, 1980

The following items have been returned to Leonard Patricelli which were previously seized from him pursuant to a search warrant served on his person on July 11, 1980. These items are being returned by Special Agent John H. Schiman, Federal Bureau of Investigation.

One (1) gold money clip — twenty dollar gold piece, date 1928

One (1) drivers license, State of Connecticut, expiration date August 17, 1981 in the name of Patricelli, Leonard Jr., 27 Mariners Lane, Stamford, Connecticut

One (1) Key ring, (silver in color) holding five (5) keys.

Eight (8) dimes, totalling 80 cents.

Leonard Patricelli /s/
Leonard Patricelli

Witnesses:

SA Donald G. Brutnell, FBI, New Haven, Ct. 7/22/80
SA Lawrence J. Welk, FBI, New Haven, Ct. 7/22/80

777-6311 ext. 260

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In the Matter of Sealed Affidavits
to Search and Seizure Warrants
Issued and Executed on
July 11, 1980

No. B80-15M-04

PETITION BY LEONARD PATRICELLI TO UNSEAL AND LIMIT INSPECTION OF AFFIDAVITS PERTAINING TO SEARCH AND SEIZURE WARRANTS ISSUED AND EXECUTED ON JULY 11, 1980 OR FOR ALTERNATIVE RELIEF

1. On July 11, 1980, the United States Magistrate for the District of Connecticut issued the following search and seizure warrants, all upon the affidavits of Special Agent John W. Schiman, of the Federal Bureau of Investigation, and/or Special Agent Terrence W. Sprankle, of the Drug Enforcement Administration, for:

(a) The person of petitioner Patricelli;

(b) The premises and curtilage located at 15 Hamilton Avenue, Stamford, Connecticut, the place of residence of petitioner Patricelli; and

(c) One 1980 grey Cadillac El Dorado bearing Connecticut license ZY 3906, registered to petitioner Patricelli.

2. On July 11, 1980, agents of the Federal Bureau of Investigation and agents of the Drug Enforcement Administration seized, *inter alia,* the driver's license, United States currency, the Cadillac automobile and other items, all more specifically identified on the inventories annexed to this petition as Exhibits A and B.

3. On or about July 11, 1980, at the request of the Government, the United States Magistrate for the District of Connecticut, without authority of law and in violation of petitioner Patricelli's constitutional right to due process of law, as guaranteed by the Fifth Amendment to the United States Constitution and his rights given by Rule 41, F.R.Cr.P., sealed from inspection by petitioner Patricelli the affidavits upon which the three search warrants were issued.

WHEREFORE, petitioner Patricelli moves that the United States Magistrate for the District of Connecticut, or any proper judicial officer:

1. Unseal and limit inspection of the affidavits pertaining to search and seizure warrants issued and executed on July 11, 1980, to petitioner Patricelli, petitioner Patricelli's attorney and government counsel, or in the alternative;

2. Suppress from use by the government and return to petitioner Patricelli all property seized pursuant to the warrants issued on July 11, 1980 to which the sealed affidavits pertain and to which the government has not shown petitioner Patricelli is not entitled to lawful possession.

Dated at Bridgeport, Connecticut, this 18th day of July, 1980.

Jacob D. Zeldes/s/
Jacob D. Zeldes

Zeldes, Needle & Cooper
A Professional Corporation
Post Office Box 1740
Bridgeport, Connecticut 06601
Tel. 333-9441

Attorney for petitioner
Patricelli

Order of the United States Magistrate
for the District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN THE MATTER OF SEALED AFFIDAVITS TO SEARCH AND SEIZURE WARRANTS ISSUED AND EXECUTED ON JULY 11, 1980

7/22/80 — Petitioner's application for suppression or alternatively, an unsealing of the affidavits in support of the search warrants should be denied. Pending review, which petitioner is free to seek to the extent provided by !aw, the affidavits will remain sealed.

Thomas P. Smith /s/

THOMAS P. SMITH, U.S. MAGISTRATE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In the Matter of Sealed Affidavits
To Search and Seizure Warrants Issued and Executed on July 11, 1980. No. B80-15M-04

PETITION BY LEONARD PATRICELLI TO REVIEW MAGISTRATE'S RULING AND/OR PETITION TO UNSEAL AND LIMIT INSPECTION OF AFFIDAVITS PERTAINING TO SEARCH AND SEIZURE WARRANTS ISSUED AND EXECUTED ON JULY 11, 1980 OR FOR ALTERNATIVE RELIEF

1. On July 11, 1980, the United States Magistrate for the District of Connecticut issued the following search and seizure warrants, all upon the affidavits of Special Agent John W. Schiman, of the Federal Bureau of Investigation, and/or Special Agent Terrence W. Sprankle, of the Drug Enforcement Administration, for:

(a) The person of petitioner Patricelli;

(b) The premises and curtilage located at 15 Hamilton Avenue, Stamford, Connecticut, the place of residence of petitioner Patricelli; and

(c) One 1980 grey Cadillac El Dorado bearing Connecticut license ZY 3906, registered to petitioner Patricelli.

2. On July 11, 1980, agents of the Federal Bureau of Investigation and agents of the Drug Enforcement Administration seized, *inter alia,* the driver's license, United States currency, the Cadillac automobile and other items, all more specifically

identified on the warrants, returns and inventories annexed to this petition as Exhibits A, B and C.

3. On or about July 11, 1980, at the request of the Government, the United States Magistrate for the District of Connecticut, without authority of law and in violation of petitioner Patricelli's constitutional right to due process of law, as guaranteed by the Fifth Amendment to the United States Constitution and his rights given by Rule 41, F.R.Cr.P., sealed from inspection by petitioner Patricelli the affidavits upon which the three search warrants were issued.

4. On July 18, 1980, petitioner Patricelli filed his Petition By Leonard Patricelli To Unseal And Limit Inspection Of Affidavits Pertaining To Search And Seizure Warrants Issued And Executed On July 11, 1980 Or For Alternative Relief and moved that the United States Magistrate, or any proper judicial officer:

(a) Unseal and limit inspection of the affidavits pertaining to search and seizure warrants issued and executed on July 11, 1980, to petitioner Patricelli, petitioner Patricelli's attorney and government counsel, or in the alternative;

(b) Suppress from use by the government and return to petitioner Patricelli all property seized pursuant to the warrants issued on July 11, 1980 to which the sealed affidavits pertain and to which the government has not shown petitioner Patricelli is not entitled to lawful possession.

On July 22, 1980, the United States Magistrate for the District of Connecticut denied petitioner Patricelli's petition with the following order:

> "Petitioner's application for suppression or, alternatively, an unsealing of the affidavits in support of the search warrants should be denied. Pending review, which petitioner is free to seek to the extent provided by law, the affidavits will remain sealed."

6. The Government has refused to make available to petitioner Patricelli copies of the affidavits upon which the search and seizure warrants issued and has refused to indicate to petitioner Patricelli when, if at all, any grand jury action will be taken with respect to this matter.

WHEREFORE, petitioner Patricelli moves pursuant to, *inter alia,* Rule 2 of the Rules for United States Magistrates, United States District Court, District of Connecticut, that the United States District Court for the District of Connecticut:

1. Review the Magistrate's ruling on petitioner Patricelli's application of July 18, 1980 for suppression or unsealing of affidavits and/or;

2. Unseal and limit inspection of the affidavits pertaining to search and seizure warrants issued and executed July 11, 1980 to petitioner Patricelli, petitioner Patricelli's attorney and government counsel, or, in the alternative;

3. Suppress from use by the Government and return to petitioner Patricelli all property seized pursuant to the warrants issued on July 11, 1980 to which the sealed affidavits pertain and to which the Government has not shown petitioner Patricelli is not entitled to lawful possession.

Dated at Bridgeport, Connecticut, this 23rd day of July, 1980.

Jacob D. Zeldes

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Post Office Box 1740
Bridgeport, CT 06601
Tel. 333-9441

Attorney for petitioner Patricelli

Opinion of the United States District Court

FOR THE

District of Connecticut

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Docket No. b 80-15M-04

IN THE MATTER OF SEALED AFFIDAVITS
TO SEARCH AND SEIZURE WARRANTS ISSUED
AND EXECUTED ON JULY 11, 1980

BEFORE:

EGINTON,
District Judge

RULING ON PETITION BY LEONARD PATRICELLI TO REVIEW MAGISTRATE'S RULING AND/OR PETITION TO UNSEAL AND LIMIT INSPECTION OF AFFIDAVITS

Upon *de novo* consideration of the papers and arguments submitted by the parties, and upon in camera inspection of the affidavits submitted by the government in support of the issuance of the search warrants here involved, the Court hereby adopts, ratifies and affirms the decision of the U.S. Magistrate to issue such search warrants and to seal the affidavits upon which their issuance was based.

It is SO ORDERED.

Dated at Bridgeport, Connecticut this 1st day of August, 1980.

Opinion of the United States Court of Appeals

FOR THE

Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 80-1333

IN THE MATTER OF SEALED AFFIDAVITS
TO SEARCH AND SEIZURE WARRANTS ISSUED
AND EXECUTED ON JULY 11, 1980

LEONARD PATRICELLI,
Appellant,

V.

UNITED STATES OF AMERICA,
Appellee.

Docket No. 80-1335

IN THE MATTER OF SEALED AFFIDAVITS
TO SEARCH AND SEIZURE WARRANTS ISSUED
AND EXECUTED ON JULY 11, 1980

FRANK PICCOLO,
Appellant,

V.

UNITED STATES OF AMERICA,
Appellee.

BEFORE:

KAUFMAN and TIMBERS,
Circuit Judges

and

BONSAL,
District Judge
sitting by designation

Appeals from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel for appellants.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the appeals are dismissed.

The "essential character" of appellants' motions was suppression of the seized items. *See In re Grand Jury Proceedings (Appeal of FMC Corp.)*. 604 F.2d 806 (3d Cir. 1979); *United States* v. *Premises Known as 608 Taylor Avenue,* 584 F.2d 1297 (3d Cir. 1978). Accordingly, the district court's orders denying the motions are not appealable. *See Imperial Distributors, Inc.* v. *United States,* 617 F.2d 892 (1st Cir. 1980). *Church of Scientology of California* v. *United States,* 591 F.2d 533 (9th Cir. 1979). *cert denied,* 444 U.S. 1043 (1980). See also *DiBella* v. *United States,* 369 F.2d 121 (1962). Should defendants be indicted, they will retain the right to move to suppress. *See Mr. Lucky Messenger Service, Inc.* v. *United States,* 587 F.2d 15 (7th Cir. 1978); *Shea* v. *Gabriel,* 520 F.2d 879 (1st Cir. 1975).

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise and in unrelated cases before this or any other court.

No. 80-1276

FILED
MAR 27 19
ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD PATRICELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1276

LEONARD PATRICELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in refusing to hear an immediate appeal from an order of the district court denying his preindictment motion to unseal affidavits submitted by the government in support of a search warrant and to suppress as evidence and return to him certain property seized pursuant to the warrant.

1. On July 11, 1980, federal law enforcement officers, acting under authority of two federal warrants, searched petitioner's house, his car, and his person; they seized cocaine, materials for weighing and packaging drugs, gambling records and paraphernalia, approximately $3,000 in cash, and petitioner's 1980 Cadillac El Dorado. Petitioner was served with copies of the warrants and an inventory of the items seized, but he was not given the affidavits underlying the warrants, which had been sealed by the issuing magistrate. On July 18, 1980, petitioner moved to unseal the

affidavits and to suppress the seized items from use by the government and require their return (Pet. App. A10-A11).[1] The magistrate denied this motion (*id.* at A12).

Petitioner renewed his motion before the district court (Pet. App. A13-A15). The district court conducted a hearing on the motion (8/1/80 Tr. 3-29) and, based "[u]pon *de novo* consideration of the papers and arguments submitted by the parties, and upon in camera inspection of the affidavits submitted by the government in support of the issuance of the search warrants here involved" (*id.* at A16), the court sustained the magistrate's decision "to issue such search warrants and to seal the affidavits upon which their issuance was based" (*ibid.*).

Petitioner sought immediate appellate review. The court of appeals dismissed the appeal in an unpublished judgment order on the ground that the " 'essential character' of [petitioner's] motion[] was suppression of the seized items" and that the denial of such a motion is not subject to interlocutory review (Pet. App. A18).

2. Petitioner emphasizes (Pet. 4) that "[t]his petition presents a single issue * * * : the appealability of a district court order, keeping sealed indefinitely documents which furnished the basis for the seizure of petitioner's property when there is no criminal prosecution *in esse*." See also *id.* at 4 n.1, 8-9. However, he cites no authority for the proposition that such an order is immediately appealable. To the contrary, as here,[2] the confidentiality of the affidavit submitted in support of the search-warrant application may be imperative to the continuation and success of an ongoing criminal investigation, and a judicial order sealing the

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[1]Prior to that time, various items had voluntarily been returned to petitioner (Pet. App. A9), including his keys and driver's license (compare Pet. 3).

[2]See C.A. App. A23.

affidavit is merely a step in the overall criminal process. Cf. *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 11; *McCray* v. *Illinois*, 386 U.S. 300 (1967). If petitioner is indicted, he may then contest the validity of the warrant, including any restrictions placed on his access to the underlying affidavit. On the other hand, if the investigation is concluded and no charge is returned against petitioner, the district court may, upon appropriate motion,[3] reconsider the propriety of the sealing order in light of those subsequent developments.[4] Cf. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978). Accordingly, the right to an immediate appeal urged by petitioner would be inconsistent both with sound investigatory practice and with orderly proceedings in the district courts at this preliminary stage of the criminal process.

b. Petitioner also contends (Pet. 4-8) that his motion to "[s]uppress from use by the government and return to [him] all property seized pursuant to the warrants * * * to which the sealed affidavits pertain * * * " (Pet. App. A11) is immediately appealable.[5] As petitioner acknowledges (Pet. 7),

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[3]It is not at all clear that the sealing of the affidavit would, by itself, be of continuing significance in the event that petitioner is not indicted. Of course, insofar as petitioner pursues any civil remedies he may have in connection with the challenged search and seizure, the maintenance of the sealed affidavit can be considered in the context of that litigation (subject to the customary standards of appealability in civil actions).

[4]The grand-jury investigation of petitioner is still in progress at this time. We are advised by the Assistant United States Attorney in charge of the investigation that action on an indictment is expected within the next 30 days.

[5]Petitioner has not alleged that his property had been retained by the government without justification or for an excessive period, or that he has been irreparably harmed by such retention. Compare *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 15, 17 (7th Cir. 1978) (independent equitable action solely for return of property based

however, recent decisions of the courts of appeals have uniformly taken the contrary view that an immediate appeal is unavailable under 28 U.S.C. 1291 where, as in this case, a grand-jury investigation is underway and "[t]he 'essential character' of [the defendant's] motion[] was suppression of the seized items" (Pet. App. A18).[6] See, *e.g.*, *Imperial Distributors, Inc.* v. *United States*, 617 F. 2d 892 (1st Cir.), cert. denied, No. 79-1967 (Oct. 6, 1980); *In re Grand Jury Proceedings (Appeal of FMC Corp.)*, 604 F. 2d 806 (3d Cir. 1979); *Consumer Credit Insurance Agency, Inc.* v. *United States*, 599 F. 2d 770, 772-773 n.2 (6th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *Church of Scientology of California* v. *United States*, 591 F. 2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *Application of the United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970); *Parrish* v. *United States*, 376 F. 2d 601, 603 (4th Cir. 1967). See also *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962). These decisions rest on the fundamental Congressional policy, embodied in 28 U.S.C. 1291, generally to preclude interlocutory appeals as of right in order to avoid the attendant consequences of piecemeal review, delay, and congestion of trial and appellate dockets. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 5-6; *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *DiBella* v. *United States*, *supra*, 369 U.S. at 124, 126; *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).[7]

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on unreasonable retention of seized items, where retention threatened irreparable injury and no indictment had been returned for more than 17 months after the seizure).

[6]With respect to the investigation of the grand jury, *United States* v. *Calandra*, 414 U.S. 338, 354 (1974), would seem to permit the use of the seized evidence regardless of the validity of the affidavit.

[7]Of course, as discussed above (see page 3, *supra*), "[i]f there is an indictment and conviction, the constitutionality of the search and seizure will be reviewed. If there is no indictment and the property is not

Without gainsaying the soundness of this principle, petitioner argues that there is a conflict in the circuits on the question of appealability. However, the three cases cited by petitioner do not demonstrate the need for the Court's review at this time.

In *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975), the district court dismissed for lack of jurisdiction a motion under Fed. R. Crim. P. 41(e) seeking the suppression of evidence and the return of property. The court of appeals held the lower court's dismissal to be appealable since "the order appealed from rested solely on jurisdictional grounds and was not a ruling on the merits of the motion as was the case in *DiBella*" (515 F. 2d at 1242-1243).[8] As made clear in its later decisions in *United States* v. *Glassman*, 533 F. 2d 262, 263 & n.3 (1976), and *Simons* v. *United States*, 592 F. 2d 251, 252, cert. denied, 444 U.S. 835 (1979), the Fifth Circuit follows the prevailing position that the denial of a Rule 41(e) motion on the merits is not appealable even if the movant has not been indicted at the time of the appeal.

In *United States* v. *Alexander*, 428 F. 2d 1169 (8th Cir. 1970), the district court refused to conduct an adversary hearing on a Rule 41(e) motion for the return and suppression of a large quantity of allegedly pornographic materials. The government did not challenge the authority of the Eighth Circuit to entertain the appeal (428 F. 2d at 1171 n.3), and accordingly the court reached the merits of the

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returned, [petitioner] can then move for its return." *Imperial Distributors, Inc.* v. *United States*, *supra*, 617 F. 2d at 896. See also Pet. App. A18.

[8]The court of appeals also noted that plaintiffs had "abandon[ed] * * * the motion for suppression * * * " (515 F. 2d at 1242) and that the litigation was "more properly considered simply as a suit in equity rather than one under the Rules of Criminal Procedure * * * [so that] return of the property would not necessarily entail suppression for the purposes of further court proceedings" (*id.* at 1245).

question whether an adversary hearing should have been held. In light of the First Amendment setting of the case (see, *e.g.*, *Walter* v. *United States*, No. 79-67 (June 20, 1980), slip op. 5 & n.6) and the government's concession of reviewability, we do not believe that *Alexander* presents a sufficient conflict to warrant review by this Court.

In *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir.), cert. denied, 382 U.S. 901 (1965), the movant filed a pre-indictment proceeding under Fed. R. Crim. P. 41(e) to have seized property returned to him and suppressed from evidence. In affirming on the merits the district court's judgment rejecting this claim, the Tenth Circuit concluded that it had jurisdiction over the movant's appeal. In light of the cursory consideration given to the question, the absence of subsequent reference to the decision by the Tenth Circuit, and the later decisions of this Court and the other courts of appeals stressing the policy against piecemeal review and interference with the grand-jury process (see page 4, *supra*), there is a substantial question whether *Gottone* is of continuing vitality. Moreover, the conflict asserted by respondent to result from *Gottone* has long existed without causing any problems of judicial administration or difficulties in the criminal justice system. Thus, we do not believe that this Court's review is required at the present time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

DOJ-1981-03